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American College Of Trial Lawyers Downstate New York Fellows Dinner Prepared Remarks Of U.S. Attorney Preet Bharara

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Thank you, Jim, for that introduction. I'd like to acknowledge some of the fellows of the American College of Trial Lawyers here tonight: Tom Tongue, the current President of the ACTL; past Presidents Greg Joseph, Bob Fiske, and Michael Cooper; the Honorable Judith Kaye, former Chief Judge of New York State Court of Appeals; the Honorable Loretta Preska, Chief Judge of the Southern District of New York; my friend, Cy Vance, District Attorney of New York County; and so many other distinguished guests here tonight. I'd like to say a special thanks to Jim Brown who put this evening together. It is an honor to be invited to speak to such a prestigious group full of such prodigious talent.

To start, let me commend and congratulate this group, of which I am not a member. I am, or at least was, a trial lawyer for the prosecution—before I was relegated to the executive suite as United States Attorney.

But some years ago, I sought to become an Assistant United States Attorney, in part, to try my hand at trying cases. And I got my wish when Mary Jo White, clearly misreading my transcript, offered me the job of AUSA 13 years ago.

But long before then, I knew that I would never be fully satisfied professionally until I got the opportunity to represent the United States in court, before a judge and a jury, at trial. I remember taking trial practice with Judge Mukasey in law school, and it was by far my favorite class.

I came to the view that the happiest lawyers around were those who have spent at least some time in the well of a courtroom, pleading a case to a jury of ordinary Americans. Having done it, I can think of no more satisfying and enriching professional experience than trying a case.

I trust, by the way, that I am preaching a bit to the choir here this evening. This is not, after all, the American College of Summary Judgment Lawyers or the American College of Plea Bargainers; it is the American College of Trial Lawyers. And you all know the dirty little secret is that you would be far less interesting at cocktail parties if you didn't have trial war stories to talk about.

But public trials in America are, I think, rightly exalted not just as exhilarating exercises for practitioners like us, but ultimately as important expressions and guarantors of democracy for the public at large.

As Thomas Jefferson wrote: "I consider [trial by jury] as the only anchor ever yet imagined by man, by which government can be held to the principles of its constitution." And yet, as countless commentators and courts have noted for many years now, the hallowed ritual of a trial is rapidly receding from the legal landscape.

In fact, the issue of the "vanishing trial" was the subject of an extensive report by this very association, the American College of Trial Lawyers, about seven years ago.

Just last week, the Supreme Court reminded us of how much criminal dispositions now rely on resolutions short of trial. As Justice Kennedy wrote for the majority in Lafler v. Cooper, "the reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials." He noted further that 97% of federal convictions and 94% of state convictions are now the result of guilty pleas.

All statistical studies bear out the trend of the vanishing trial. The trend in civil matters is no different. According to one study, in 1938 about 20% of federal civil cases went to trial; by 1962, that was down to 12%; and by 2009, it was 1.7%. Indeed, law professors Marc Galanter and Angela Frozena have concluded that the civil trial in the federal courts is nearing "extinction." The experience in my office bears that out as well. We have about 36% fewer trials than 10 years ago, and 25% fewer trials than just 5 years ago.

The causes for this trend, we are told, are myriad. Certainly on the criminal side, risk is a significant factor given uncertainty and given the U.S. Sentencing Guidelines. The cost of losing at trial is too high. As Federal Defender John Byrnes once put it when I asked him why his client was going to trial: "Well you know, Preet, everyone has a constitutional right to the maximum."

Some suggest another reason is a growing judicial hostility to trials—that judges see themselves as case managers more and more and see trials as failures of case management.

Still others say that the general inexperience of lawyers these days makes them less likely to feel confident about how to try a case. And there are other causes, some hotly debated.

But while there is a debate about the causes of the vanishing trial, there is also a debate about whether this is necessarily a bad development. There is no question that from a resource perspective, avoiding the enormous drain occasioned by a full-blown trial is welcome to efficiency advocates everywhere.

And I understand that argument first-hand now like never before. I know more than anyone now the benefits of resolution before trial. We are still in the midst of a hiring freeze—I didn't swear in an AUSA for 12 ½ months. There were no new AUSAs between February 14, 2011 and February 27, 2012. And so every time two or three of my best Assistants are on trial for two months, their investigations are likely to languish. So, there is great efficiency in getting cases done. Trials are a tremendous opportunity cost, often times, for the government. Nonetheless, we are constantly talking about how to get AUSAs *more* trials, not fewer.

Cost-savings aside, there are also costs associated with these dwindling trial numbers. Many of them are intangible and impossible to quantify, but they are costs nonetheless. Among other things, it is said, the disappearance of trials threatens to undermine the legitimating function of our courts.

More than that, it is said, as trials vanish, public understanding suffers; public confidence suffers; justice suffers; and eventually democracy itself suffers.

Judge William Young in Boston has spoken poignantly about this. According to Judge Young, without jury trials, the courts' "status as the grassroots guardians of constitutional values is threatened as never before." There is truth in that.

Some of these concerns were catalogued in an important article by Professor Robert Burns last year entitled, "What Will We Lose if the Trial Vanishes?" An answer was provided by a chorus of courts:

- **As one federal district judge put it, "The jury trial is the canary in the mineshaft" of our democracy. "[I]f it goes, if our people lose their inherited right to do justice in court, other democratic institutions will lose breath too."**
- **Here's how Circuit Judge Damon Keith put it: "[D]emocracy dies behind closed doors."**
- **Here's how a state appellate court in California once put it: "Popular justice is public justice."**

There is truth in all of those formulations. Trials, after all, are showcase moments for our legal system and for the rule of law—they fulfill the requirement that justice must not only be done but must be seen to be done. In many ways, trials are touchstones of our democracy, in its most direct and tactile form.

When trials vanish, citizenship also suffers. It is at a trial where ordinary people are, for a time, pressed into extraordinary service. There is no more momentous moment than a jury verdict in a criminal case. I had the privilege, in a previous life, of being present on the floor of the United States Senate during the roll call votes—with every Senator standing at his or her desk and responding yea or nay in alphabetical order—of two Supreme Court justices. And I can tell you that this doesn't even come close to the somberness of a jury foreperson pronouncing a verdict of guilty or not guilty upon a fellow citizen.

And there are other costs still. Separate and apart from the damage done overall to our system when trials vanish, the quality of justice done in particular cases may be compromised if resolutions are reached in part because the analysis of the litigators is distorted by the reality that they have no trial experience and have no confidence about their skills in the courtroom—because trials are vanishing. As you can see, this can become a self-sustaining cycle.

Still others lament what the vanishing trial phenomenon might do to our distinctly American culture. Professor Paul Butler of George Washington University Law School has put it this way: "Nobody does trials like Americans. We made it an art form. It's almost as fundamental a part of our culture as jazz or rock 'n' roll."

I suppose that is right. As a giant movie fan, I shudder to think what our cinematic legacy would be if Hollywood screenwriters and directors could not place at the heart of so many films the quintessentially American courtroom clash. I'm guessing not many people would go see a movie called "12 Angry Mediators." And "Arbitration at Nuremburg" doesn't exactly have a blockbuster's ring to it.

Now, one can object that it is all well and good to wax poetic about the gloriousness of trials, but we should take care not to become overly nostalgic. There are those who warn against overly romanticizing trials, who caution against remembering a past that never was. Though trials may be coming along more infrequently, trial by jury has never been the chief means of dispute resolution in America. So perhaps we should not get carried away.

In any event, with full knowledge that I may be flouting the very admonition against romanticism I just recited, I want to close with something of a lament about a consequence of the disappearing trial that seems to get short shrift. And it is this: the inexorable corollary to the vanishing trial is the vanishing trial lawyer. Few, if any, of the academic musings about the vanishing trial really focus much on this point.

But I believe there is a real cost to our profession when trials die and great and wise trial lawyers fade away, with no on-deck circle for the next generation of trial lawyers because there are no more opportunities to come to the plate and swing the bat.

The death of the trial would necessarily mean the extinction of the great trial lawyer.

And while I believe that claims about the demise of the trial as a central legal event in our democracy may be somewhat exaggerated, the overwhelming evidence suggests that trials are in fact on the wane and that there is not much prospect that this trend will reverse itself anytime soon.

And so while I think that trial lawyers in the grand tradition are not likely to become extinct, they are looking more and more like endangered species. And, over time, incoming classes to the American College of Trial Lawyers will look less and less like their predecessors. That is something that should worry people. And, though I must admit I have no real solutions to propose today, it worries me.

When the archetype of the wise and seasoned trial lawyer in the best tradition of this College begins to seem quaint, the profession, I think, will begin to lose something. And not just the profession, but society as a whole.

And why is that?

I believe that the law is a special profession, and I believe also that trial lawyers in the great tradition hold a special place within it. That conclusion derives mainly from a particular view of what makes the great trial lawyer special in the first place:

- **The great trial lawyer must be simultaneously committed to exhaustive preparation and yet capable of spontaneous eloquence.**
- **She must possess the endurance of a marathon runner and also the reflexes of a fighter pilot.**
- **She must possess not only an exacting intelligence but also a quick wit.**
- **She must be skilled in both artistry *and* analysis; be blessed with both charisma *and* character; be expert on both the law *and* human nature; must see both the trees *and* the forest.**
- **The great trial lawyer is simultaneously actor, storyteller, orator, investigator, and stage director.**
- **She has a keen sense of perspective and proportion and also always an acute sense of justice.**

Great trial lawyers like those admitted to the College, moreover, are *learned*, not just in books and caselaw, but learned in the way once described by former President of the College of William and Mary, Timothy Sullivan, who has spoken movingly about the loss of the great lawyer tradition:

"[T]o be learned means to be broadly and to be deeply educated—not just in techniques—but in values; not just in the narrow knowledge of high

specialization, but in the complex and the powerful forces that shape civilization and govern human conduct."

At the highest level, the practice of law in the courtroom exalts and rewards not just craft, but common sense and wise judgment and good character. And those qualities—nurtured and built over years of high-stakes courtroom practice—are the essential pillars not just of great lawyering, but of every important form leadership.

The courtroom is, of all things, an incubator of leaders. History has shown us this time and time again.

And everywhere you look in this country these days, it seems that what is so lacking—and something whose absence is so truly worth lamenting—is leadership.

As I see it, one of the greatest threats arising from the phenomenon of the vanishing trial is this: the loss of a training ground for future leaders like many of you in this room.

We need lawyers like those worthy of admission to the College to be growing in number, not dwindling. We need worthy lawyers who can be leaders more than ever before. And to some people, myself included, much more than our profession is at stake. To quote from former William and Mary President Sullivan once more:

"If our profession's plight mattered only to its members, I would be tempted to join the pessimists who say that reform is doomed. The larger world does seem so often deaf to all but the noisy chorus of commercial considerations. But it is not our profession alone that is at risk, it is our system of justice, the very idea of the rule of law. In singular ways, lawyers are guarantors of the success of the American experiment. The fate of our nation's freedom is linked to the future of our profession."

Though we lawyers are much maligned, I continue to believe in the increasingly quaint and uncommon view that to become a lawyer is to join a noble profession. I continue to believe also that there is no one better situated to promote equality, preserve liberty, and prevent cruelty than the person who has genuinely dedicated himself to becoming both a master and a servant of the law.

In the end, giving yourself to the law is an act of almost spectacular idealism, for it bespeaks an abiding faith in the possibility of self-governance, rationality, and the peaceful resolution of disputes. And it is that idealism, coupled with skill and judgment, that needs to be brought to bear on our most difficult problems—in our law, in our politics, in our society.

And there is no bar better than this one to help in that noble project. That is why I so sincerely hope we find a way to increase your ranks.

Thank you.

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